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IN THE

SUPREME COURT

OF THE

UNITED STATES

76-1706

OCTOBER TERM, 1976

No. .....

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL.,

Respondents,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above-entitled case on February 3, 1977. The judgment became final on March 7, 1977.

OPINION BELOW

The opinion of the Washington State Supreme Court, reproduced in Appendix A hereto, is reported in 88 Wn.2d 315, 559 P.2d 997 (1977).

JURISDICTION

The opinion of the court below was filed on February 3, 1977 (Appendix A, *infra*). In Washington, no separate judgment is entered. The remittitur was entered on March 7, 1977 (Appendix B). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Do the Commerce Clause and the Import-Export Clause of the Federal Constitution create an absolute immunity from state taxation for local stevedoring activity?

2. In testing, under the Commerce and Import-Export Clauses, the validity of a general, nondiscriminatory state tax as applied to local stevedoring activity, are the *Stevedoring Cases* [1] any longer controlling after *Complete Auto Transit, Inc. v. Brady*, No. 76-29,..... U.S. ....., 51 L.Ed.2d 326, 97 S.Ct ..... (March 7, 1977) and *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 46 L.Ed.2d 495, 96 S.Ct. 535 (1976)?

CONSTITUTIONAL PROVISIONS, APPLICABLE STATUTES AND ADMINISTRATIVE RULES

United States Constitution, Article I, Section 10, Clause 2. United States Constitution, Article I, Section 8, Clause 3.

[1] *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 82 L.Ed. 68, 58 S.Ct. 72 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L.Ed. 993, 67 S.Ct. 815 (1947).

Revised Code of Washington 82.04.220 and 82.04.290 (Appendix C). Washington Administrative Code 458-20-193D (Appendix D).

STATEMENT OF THE CASE

The Washington State Supreme Court held that the business activity of local stevedores who load and unload ships which sail in interstate and foreign commerce was "absolutely protected" from the Washington Business and Occupation tax by virtue of the Commerce Clause[2] and the Import-Export Clause.[3] This question was the sole issue raised in plaintiffs' petition for a declaratory judgment on the validity of the state's rule which upheld the tax on such activity.[4]

Relying on *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 82 L.Ed. 68, 58 S.Ct. 72 (1937)[5] and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L.Ed. 993, 67 S.Ct. 815 (1947), hereafter *Stevedoring Cases*; and also citing *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951), the Washington Supreme Court gave the following rationale for striking down the tax[6] as applied to stevedoring:

[2] U.S. Constitution, Article I, section 8.

[3] U.S. Constitution, Article I, section 10.

[4] Plaintiff's petition is attached as Appendix E and the opinion of the trial court as Appendix F. The assignment of error for the Washington State Supreme Court's review as found in appellant's brief before that Court is attached as Appendix G.

[5] This present case before the Court involves the identical state, identical stevedores and identical tax as does the *Puget Sound Stevedoring Co.* case, *supra*, decided in 1937. It is, of course, this unusual circumstance with which the Washington State Supreme Court was faced.

[6] This business and occupation tax, a gross receipts tax, is not unfamiliar to this Court. See *General Motors Corp. v. Washington*,

> "The United States Supreme Court obviously viewed stevedoring as an integrated inseparable part of commerce by sea, and hence absolutely protected." 88 Wn.2d at 318, 559 P.2d at 998

In brief, the decision below held that this Court still requires an otherwise valid state tax be struck down if it falls on one species of business activity connected with commerce, i.e. stevedoring. And the tax must fall even if that activity takes piace entirely within one state.

There was no showing of lack of nexus. Nor was there a showing that the tax is unrelated to services provided by the state; or that the tax discriminates; or that the tax is unfairly apportioned; or that it is a licensing provision; or that it is an act of direct regulation of commerce. Finally, there was no showing that it is an impost or duty.

The court below was fully aware of the anomalous nature of its holding; it believed it had no choice because of the prior opinions of this Court in the *Stevedoring Cases*:

> "The courts of the several states seem to be unanimous in their recognition of this obligation to follow controlling Supreme Court precedent on such matters.
> "Fully mindful of our prior criticism of the principles and reasoning of the stevedore cases (*see Washington-Oregon Shippers Cooperative Ass'n v. Schumacher*, 59 Wn.2d 159, 167, 367 P.2d 112, 115-16 (1961)), we must nevertheless hold the instant tax on stevedoring invalid."

377 U.S. 436, 12 L.Ed. 2d 430, 84 S.Ct. 1564 (1964), and *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 42 L.Ed.2d 719, 95 S.Ct. 706 (1975).

> 88 Wn.2d 319-320, 559 P.2d 999; [footnote omitted].

Although conscious of the principles held controlling in prior decisions of this Court such as *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 44 L.Ed.2d 1, 95 S.Ct. 1538 (1975) and *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 46 L.Ed.2d 495, 96 S.Ct. 535 (1976)—principles reaffirmed by this Court in *Complete Auto Transit, Inc. v. Brady*, No. 76-29 ..... U.S. ....., 51 L.Ed.2d 326, 97 S.Ct. ..... (March 7, 1977) the court below held that these principles are to be ignored because of the *Stevedoring Cases*. The Washington Supreme Court did not even consider the principles recently handed down by this court because it saw itself as absolutely constricted by the *Stevedoring Cases*. It saw its duty to this Court as completely barring it from even considering whether principles in prior decisions have been overruled by principles in current decisions.

REASONS FOR GRANTING THE WRIT

In order to eliminate the unique and anomalous status of stevedoring as compared to all other businesses involving interstate and foreign commerce and thus provide for a uniform application of the constitutional principles enumerated by this Court, the writ of certiorari should be granted.

In *Michelin Tire*, *supra*, and *Complete Auto Transit*, *supra*, this Court made a searching reexamination of its prior decisions delineating the scope of state taxing power under the Import-Export clause

and the Commerce Clause. As part of this reexamination, it firmly established the principles to be used in testing the validity of the state tax under each of these two constitutional provisions. And in so doing, it overruled landmark decisions which were inconsistent with these principles.

In holding that a general, nondiscriminatory tax was not a duty or impost within the meaning of the import-export clause, *Michelin Tire*, *supra*, overruled *Low v. Austin*, 80 U.S. (13 Wall.), 29 L.Ed. 517 (1872).[7] In holding that the commerce clause creates no " 'free trade' immunity" (*Complete Auto Transit*, *supra*, p. 330) for interstate commerce, but instead permits a fairly apportioned and nondiscriminatory tax even upon the privilege of engaging in a purely interstate business, *Complete Auto Transit*, *supra*, overruled *Spector Motor Service, Inc.*, *supra*.

The decison below, and the *Stevedoring Cases* on which it was based, are not reconcilable with the principles established in *Michelin Tire*, *supra*, and *Complete Auto Transit*, *supra*. The *Stevedoring Cases* should go the way of *Low*, *supra*, and *Spector Motors*, *supra*. By so overruling the *Stevedoring Cases* the Court will complete the process of clarifying the scope of state taxing power which it commenced in *Michelin Tire*, *supra*, and *Complete Auto Transit*, *supra*. Further, it will eliminate the last vestige of now discarded interpretations of the Im-

[7]At issue in *Michelin*, *supra*, of course, was a general *ad valorem* tax but footnote 7 at p. 288 of that opinion makes clear by using an excise tax illustration that neither kind of tax is of this "particular category" subject to be prohibited by the import-export clause.

port-Export Clause and the Commerce Clause, along with the unworkable and essentially irrational distinctions which those interpretations have engendered.[8]

CONCLUSION

In order to eliminate the unique and anomalous status of stevedoring business from all other businesses involving interstate and foreign commerce the writ of certiorari should be granted. This will assure a uniform nationwide application of the Commerce Clause and Import-Export Clause to the stevedoring business.

Alternatively, the judgment of the court below should be vacated and the case remanded with instructions to reconsider the decision in the light of *Complete Auto Transit*, *supra*, and *Michelin*, *supra*.

Respectfully submitted,

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[8]For examples of the type of problems which the *Stevedoring Cases* present to state courts, and the casuistic distinctions which these cases force state courts to engage in, see *Martin Ship Serv. Co. v. Los Angeles*, 34 Cal.2d 793, 215 P.2d 24 (1950); *Washington-Oregon Shippers Cooperative Ass'n v. Schumacher*, 59 Wn.2d 159, 367 P.2d 112 (1961); *HC&D Moving & Storage Co. v. Yamane*, 48 Hawaii 486, 405 P.2d 382 (1965).

APPENDIX A

[No. 44140. En Banc. February 3, 1977]

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL, *Respondents*, v. THE DEPARTMENT OF REVENUE, *Appellant*.

[1] Constitutional Law—Courts—Stare Decisis—Federal Constitution. Decisions of the United States Supreme Court interpreting and applying provisions of the federal constitution are controlling upon state courts in ruling upon the same issues.

[2] Taxation—Commerce—Exports—Tax on Stevedoring—Validity. The activity of stevedoring is a part of commerce, and application of the business and occupation tax to a stevedoring business is invalid under both the interstate commerce clause (U.S. Const. art. 1, § 8) and the import-export clause (U.S. Const. art. 1, § 10).

UTTER and DOLLIVER, JJ., dissent by separate opinion; HOROWITZ and HICKS, JJ., did not participate in the disposition of this case.

Nature of Action: Challenge against the imposition of the general business and occupation tax on the activity of stevedoring.

Superior Court: The Superior Court for Thurston County, No. 51818, Frank E. Baker, J., entered a judgment in favor of the plaintiffs on November 24, 1975, declaring the state tax to be in violation of the interstate commerce clause and the import-export clause.

Supreme Court: On appeal by the Department of Revenue, the Supreme Court *affirms* the trial court decision on the same constitutional grounds.

Slade Gorton, Attorney General, and *Richard D. Hicks, Assistant,* for appellant.

Bogle & Gates, John T. Piper, and *D. Michael Young,* for respondents.

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This opinion was prepared by Justice Robert T. Hunter prior to his retirement. It is adopted by the undersigned Justices as the opinion of this Court.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[No. 44140 En Banc. February 3, 1977]

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND WASHINGTON PUBLIC PORTS ASSOCIATION, *Respondents*, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, *Appellant*.

The State appeals from a declaratory judgment of the Superior Court for Thurston County, declaring a state tax repugnant to the United States Constitution. This court has taken jurisdiction as the proper forum for disposition of such issue, pursuant to RCW 2. 06.030(c) and ROA I-14(1)(c).

The trial court held that WAC 458-20-193D, as amended in 1974 to apply the state's general business and occupation tax to stevedoring activity, contravenes the Interstate Commerce Clause (U.S. Const.

1, § 8, Cl. 3) and the Import-Export Clause (U.S. Const. art. 1, § 10, Cl. 2). The trial court was adhering to two United States Supreme Court decisions, one of them having been brought up from this jurisdiction, on the precise issue raised in this appeal. We find the two cases to be indistinguishable, factually, from the instant case; hence, we also adhere to them, and affirm the trial court.

The first case the Supreme Court decided on the issue was *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 82 L. Ed. 68, 58 S. Ct. 72 (1937). Our court had upheld a state tax on the loading and unloading of ships plying interstate and foreign commerce. That decision was appealed to the United States Supreme Court, which reversed, holding that the business of loading and unloading ships *is* interstate commerce and is therefore not taxable by the state. We quote language from *Puget Sound Stevedoring Co. v. Tax Commission*, *supra* at 93, to show the court's reasoning:

> "[S]tevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the 'first place of rest' and vice versa." * * * The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments.

Almost 10 years later the City of New York attempted to impose the same type of tax on identical stevedoring activity. The New York Supreme Court struck the tax down on authority of *Puget Sound*,

supra. The Court of Appeals then affirmed, and certiorari was granted by the United States Supreme Court, which also affirmed. *Joseph v. Carter & Weekes Co.*, 330 U.S. 422, 91 L. Ed. 993, 67 S. Ct. 815 (1947), thus became the second of what we refer to, for the sake of convenience, as the "stevedoring cases."

The petitioners in *Joseph v. Carter & Weekes Co.*, *supra* at 425-26, presented the Supreme Court with the same argument that is now presented by appellant to this court, quoting as follows:

> Petitioners recognize the force of the *Puget Sound* case as a precedent. Their argument is that subsequent holdings of this Court have indicated that the reasons which underlay the decisions are no longer controlling in judicial examination of the constitutionality of state taxation of the gross proceeds derived from commerce, subject to federal regulation. They cite, among others, these later decisions: *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250; *Southern Pacific Co. v. Gallagher*, 306 U.S. 167; *McGoldrick v. Berwind-White Co.*, 309 U.S. 33; *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62.

The Court then analyzed the cases, stating as follows:

> Upon examination this history gives an impression that there has been a doubt as to the continued vitality of *Puget Sound*. We come now face to face with the problem of overruling or approving the case.

Joseph v. Carter & Weekes Co., *supra* at 430.

Puget Sound was reaffirmed. The cases cited by petitioners were distinguished on the reasoning that

stevedoring is essentially a part of the commerce itself, more a part of commerce than any of the activities held validly taxed in the later cases. The Court stated:

> Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself.

Joseph v. Carter & Weekes Co., supra at 433.

The United States Supreme Court obviously views stevedoring as an integrated inseparable part of commerce by sea, and hence absolutely protected.

The appellant in the cause before us makes the argument that subsequent decisions of the United States Supreme Court have either impliedly overruled the stevedoring cases or eroded the principles upon which the result in those cases was reached. As authority for this argument, appellant cites some of the same cases presented by petitioners in *Carter & Weekes*, in support of the same theory. Appellant also cites more recent Supreme Court commerce clause dicisions, including *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948); *Interstate Oil Pipeline v. Stone*, 337 U.S. 662, 93 L. Ed. 1613, 69 S. Ct. 1264 (1949); *Canton R.R. v. Rogan*, 340 U.S. 511, 95 L. Ed. 488, 71 S. Ct. 447 (1951); *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 44 L. Ed. 2d 1, 95 S. Ct. 1538 (1975). A very recent import-export clause case is also cited,

Michelin Tire Corp. v. Wages, ... U.S. ..... 46 L. Ed. 2d 495, 96 S. Ct. ..... (1976).

We have examined carefully each of the cases cited by appellant, and others not cited. (*Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L. Ed. 573, 71 S. Ct. 508 (1951), and *Michigan-Wisconsin Pipeline Co v. Calvert*, 347 U.S. 157, 98 L. Ed. 583, 74 S. Ct. 396 (1954).) We are of the opinion that the United States Supreme Court has not overruled its stevedoring decisions by implication, nor has there been any clear indication that the court would welcome the opportunity to do so

We are therefore persuaded that we must hold the tax invalid; we do so in recognition of our duty to abide by controlling United States Supreme Court decisions construing the federal constitution. Hence, we find it unnecessary to discuss the aforementioned cases beyond the fact that nowhere in them do we find language criticizing, expressly contradicting, or overruling (even impliedly) the stevedoring cases.

We have been constrained before by controlling United States Supreme Court decisions in this area. *See B. F. Goodrich v. State*, 38 Wn.2d 663, 231 P.2d 325, *cert denied*, 342 U.S. 876, 96 L. Ed. 659. 72 S. Ct. 167 (1951), where essentially the same arguments were raised as in this appeal, on the issue of whether the state violated the commerce clause by assessing a tax on Goodrich's activity. As here, a United States Supreme Court case was controlling. To ease our doubts about the required result, we stated in *Goodrich* on pages 674 and 676:

Whatever we may think of this distinction from the standpoint of practical effect, our only concern with it here is that it has been made and must be observed.

* * *

These questions, however, are by no means novel; they have often been raised, and the supreme court has often considered them, as an analysis of its cases will readily reveal. It scarcely needs be said that, with respect to matters involving the Federal constitution, we, as an inferior tribunal, must follow the pronouncements of that court no matter what our private views may be.

See also Tricon, Inc. v. King County, 60 Wn.2d 392, 374 P.2d 174, *cert. denied*, 372 U.S. 908, 9 L. Ed. 2d 717, 83 S. Ct. 721 (1962). The courts of the several states seem to be unanimous in their recognition of this obligation to follow controlling Supreme Court precedent on such matters.[1]

Fully mindful of our prior criticism of the principles and reasoning of the stevedore cases (*See Washington-Oregon Shippers Cooperative Ass'n, Inc. v. Schumacher*, 59 Wn.2d 159, 167, 367 P.2d 112,

[1]For example, the Indiana Supreme Court has said:

"Regardless of our personal opinion [illegible] both as to the law and the facts, we are bound, as a matter of [illegible] Court, under the oath we took to follow the Constitution of the United States, as interpreted by the Supreme Court of the United States, and that Court, in our opinion, has determined the issue in this case." *Cuffel v. State*, 247 Ind. 357, 215 N.E.2d 36, 37 (1966).

Accord, *Mealey v. Martin*, 468 P.2d 965, 966-67 (Alas. 1970); *Baldwin v. Arizona Flame Restaurant*, 313 P.2d 759, 764 (Ariz. 1957); *People v. Dorado*, 398 P.2d 361, 365-66, 372, 373 (Cal. 1965); *Belton v. Gebhart*, 91 A.2d 137, 141 (Del. 1952), *aff'd sub nom. Brown v. Board of Education*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955); *Looper v. Georgia, Southern & Florida R.R.*, 99 S.E.2d 101, 104 (Ga. 1957); *Cuffel v. State, supra*; *Trinkle v. Hand*, 337 P.2d 665, 667, 668 (Kan.), *cert. denied*, 361 U.S. 846, 80 S. Ct. 101, 4 L. Ed. 2d 85 (1959); *Glover v. Minneapolis Bldg. Trades Council*, 10 N.W.2d 481, 482, 484 (Minn. 1943); *Bourjois Sales Corp. v. Dorfman*, 7 N.E.2d 30 (N.Y. 1937). See generally C.J.S., Courts § 206.

115-16 (1961)), we must nevertheless hold the instant tax on stevedoring invalid.

The judgment of the trial court is affirmed.

We concur:

STAFFORD, J.
ROSELLINI, J.
HAMILTON, J.
WRIGHT, C.J.
BRACHTENBACH, J.
WIEHL, J.P.T.

No. 44140

UTTER, J. (dissenting)—I believe the stevedoring cases[1] upon which the majority relies have been impliedly overruled and are also distinguishable from the facts here presented. The United States Supreme Court in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 82 L. Ed. 823, 58 S. Ct. 546 (1938); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948); *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 93 L. Ed. 1613, 69 S. Ct. 1264 (1949); *Canton R.R. v. Rogan*, 340 U.S. 511, 95 L. Ed. 488, 71 S. Ct. 447 (1951); *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 44 L. Ed. 2d 1, 95 S. Ct. 1538 (1975), has severely eroded the scope of the "direct-indirect" test enunciated in the stevedoring cases. In addition, the Supreme Court's inaction in the face of the question-

[1]*Puget Sound Stevedoring Co. v. Tax Comm'n*, 302 U.S. 90, 82 L. Ed. 68, 58 S. Ct. 72 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L. Ed. 993, 67 S. Ct. 815 (1947).

ing of the continued validity of the stevedoring cases in *Martin Ship Service Co. v. Los Angeles*, 34 Cal. 2d 793, 215 P.2d 24 (1950); *Washington-Oregon Shippers Coop. Ass'n, Inc. v. Schumacher*, 59 Wn.2d 159, 367 P.2d 112 (1961); *HC&D Moving & Storage Co. v. Yamane*, 48 Hawaii 486, 405 P.2d 382 (1965); raises further doubts as to the necessity of their use as mandatory precedent here.

The clause here at issue is the commerce clause[2] rather than the import-export clause.[3] A state generally has broader discretion in taxing activities than goods. *Canton R.R. v. Rogan, supra*. The commerce clause involves a grant of power to Congress, in the face of which a state may exercise its power so long as it does not negate the Union's ability to act. The import-export clause imposes the same limits as the commerce clause as well as depriving the states of the ability to levy an impost or duty on an export or import. *Michelin Tire Corp. v. Wages*, ... U.S. ....., 46 L. Ed. 2d 495, 96 S. Ct. ..... (1976).

The buiness and occupation tax, even though it reaches stevedoring activity, it not a tax on imports or an impost or duty on the activity of importing. Stevedores are not importers nor is stevedoring an

[2]U.S. Const. art. 1, § 8, reads in part:
"* * *
"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

[3]U.S. Const. art. 1, § 10, reads in part:
"* * *
"No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

importing activity, for stevedores have no direct relationships to imports, but only to the process of importing and exporting. *Sea-Land Serv., Inc. v. County of Alameda*, 12 Cal. 3d 772, 528 P.2d 56, 117 Cal Rptr. 448 (1974); *Canton R.R. v. Rogan, supra*.

Stevedoring activity, while necessary to interstate commerce, is not in itself interstate commerce. All activity takes place locally, that is, wholly within this state, and involves the type of business for which the state affords protection. *Michelin Tire Corp. v. Wages, supra* at 505. This state's business and occupation tax is not selectively imposed. It is a general occupation tax and does not substantially impair or prohibit transportation. As such it does not violate the import-export clause.

Even if the loading and unloading of ships can be said to have interstate characteristics, the state may still levy a nondiscriminatory gross receipts tax if there is no multiple burden or regulation of commerce. A nondiscriminatory tax on interstate commerce is valid if it is apportioned and does not reach activities beyond the state's borders. *Canton R.R. v. Rogan, supra* at 515.

A tax which is not an impost or duty and therefore prohibited, or an act of direct regulation, such as a license, is a general tax and is not forbidden unless it is a regulation of commerce in disguise. *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964). The state can tax but cannot regulate commerce by any means.

Brown v. Maryland, 25 (12 Wheat.) 419, 448, 449, 6 L. Ed. 678 (1827). However, a general business and occupation tax is "not a licensing provision for the regulation of a business or calling, nor does it impose conditions prerequisite to engaging in business within the state." *Smith v. State*, 64 Wn.2d 323, 333, 391 P.2d 718 (1964).

There is no showing that this tax is offensive to the commerce clause and it should be upheld.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

REMITTITUR

No. 44140

Thurston County No. 51818

Court of Appeals No. 2204-II

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL, *Respondents*,

v.

THE DEPARTMENT OF REVENUE, *Appellant*.

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on February 3, 1977, became the final judgment of this court in the above entitled case on March 7, 1977. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

$392.73 in favor of respondents and against appellant.

APPENDIX C

82.04.220 Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

82.04.290 Tax on other business or service aetivities. Upon every person engaging within this state in any business activity other than or in addition to those enumerated in RCW 82.04.230, 82.04.240, 82.04.250, 82.04.255, 82.04.260, 82.04.270, 82.04.275 and 82.04.280; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one percent. This section includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion, or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale." The value of advertising, demonstration, and promotaional supplies and materials furnished to an agent by his principal or supplier to be used for informational, educational and promotional purposes shall not be considered a part of the agent's remuneration or commission and shall not be subject to taxation under this section.

APPENDIX D

STATE OF WASHINGTON
DEPARTMENT OF REVENUE
Olympia, Washington

WAC 458-20-193D (Rule 193—Part D)
TRANSPORTATION, COMMUNICATION,
PUBLIC UTILITY ACTIVITIES, OR
OTHER SERVICES IN INTERSTATE
OR FOREIGN COMMERCE

Rule 193 deals with interstate and foreign commerce and is published in four separate parts:

Part A. Sales of Goods Originating in Washington to Persons in Other States.

Part B. Sales of Goods Originating in Other States to Persons in Washington.

Part C. Imports and Exports: Sales of Goods from or to Persons in Foreign Countries.

Part D. Transportation, Communication, Public Utility Activities, or Other Services in Interstate or Foreign Commerce.

PART D.

BUSINESS AND OCCUPATION TAX,
PUBLIC UTILITY TAX

In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to

the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accommodations, providing funds and the like, by which they engage in such commerce is taxable.

EXAMPLES OF EXEMPT INCOME:

1. Income from those activities which consist of the actual transportation of persons or property across the state's boundaries is exempt.
2. That portion of commissions received by local brokers or commission merchants for interstate or foreign sales which was paid to out-of-state independent agents is exempt.
3. Income from services rendered by an out-of-state branch or office of the taxpayer regularly maintained outside the state is exempt. (See Rule 194.)

EXAMPLES OF TAXABLE INCOME:

1. Compensation received by persons engaged in business within this state for performance

of business activities which are only ancillary to transportation across the state's boundaries is taxable.

2. Compensation received by merchandise brokers or commission merchants for services rendered within this state to principals engaged in interstate or foreign commerce is taxable.
3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable.

In computing public utility tax, there may be deducted from gross income so much thereof as is derived from actually transporting persons or property or transmitting communications or electrical energy, from this state to another state or territory or to a foreign country and vice versa.

Persons, including dock companies or wharfage companies, are permitted no deduction of gross income from services performed in this state consisting of the handling of cargo or freight even though such cargo or freight has moved or will move across the state's boundaries.

No deduction is permitted with respect to gross income derived from activities which are ancillary to transportation across the state's boundaries, such as income received by a wharf company or warehouse company for the storage of goods. The mere ownership or operation of facilities by means of which others engage in foreign or interstate commerce is

an activity ancillary to such commerce and any income received therefrom is taxable.

Insofar as the transportation of goods is concerned, the interstate movement of cargo or freight ceases when the goods have arrived at the destination to which it was billed by the out-of-state shipper, and no deduction is permitted of the gross income derived from transporting the same from such point of destination in this state to another point within this state. Thus, freight is billed from San Francisco, or a foreign point, to Seattle. After arrival in Seattle it is transported to Spokane. No deduction is permitted of the gross income received for the transportation from Seattle to Spokane. Again, freight is billed from San Francisco, or a foreign point, to a line carrier's terminal, or a public warehouse in Seattle. After arrival in Seattle it is transported from the line carrier's terminal or public warehouse to the buyer's place of business in Seattle. No deduction is permitted of the gross income received as transportation charges from the line carrier's terminal or public warehouse to the buyer's place of business in Seattle.

Revised May 3, 1974.

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 51818

PETITION FOR DECLARATORY JUDGMENT ON VALIDITY OF RULE

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND THE WASHINGTON PUBLIC PORTS ASSOCIATION,

Petitioners,

vs.

THE DEPARTMENT OF REVENUE,

Respondents.

Petitioners state as follows:

I.

The Association of Washington Stevedoring Companies is an unincorporated association of private companies engaged in the stevedoring business. The Washington Public Ports Association is a nonprofit corporation having a membership consisting of certain port authorities in the State of Washington that engage in stevedoring activities.

II.

The Department of Revenue has been established by law as a department of Washington State government. Its chief executive officer has been designated the Director of Revenue.

III.

The Director, acting through the Department, is authorized and directed to make, adopt and publish such rules and regulations as he may deem necessary or desirable to carry out the powers and duties imposed upon him (or the Department) by the legislature.

IV.

The predecessor of the Department was the Tax Commission of the State of Washington. The Tax Commission, after the enactment of the Business and Occupation Tax (Chapter 180, Laws of 1935), adopted its Rule 198 making the tax applicable to compensation received by a stevedoring company for loading and unloading vessels engaged in interstate commerce. That rule remained in effect until the decision by the United States Supreme Court in *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U.S. 90, 82 L. ed. 68 (1937), which held the tax on the stevedoring activities there in issue unconstitutional. The Tax Commission's rules and regulations, as revised May 1, 1939, reflected a change in the rule to exclude from the Business and Occupation Tax compensation received by a contracting stevedoring company for loading and unloading cargo from vessels where such cargo is moving in interstate or foreign commerce and where the work is actually directed and controlled by the stevedoring company. The rule thereafter remained substantially the same until May 3, 1974.

V.

On May 3, 1974, the Department adopted its revised Rule 193-D providing in part:

> "3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable".

The Business and Occupation Tax law under which the revised rule was adopted remains the same as the law at issue in *Puget Sound Stevedoring, supra.*

VI.

The private stevedoring companies that constitute the petitioner Association of Washington Stevedoring Companies, are engaged in the same stevedoring activities that were held not taxable in *Puget Sound Stevedoring Co. v. State Tax Commission, supra.* Many of the port authority members of the petitioner Washington Public Ports Association are also engaged in such activity. Accordingly, the threatened application of the Department's revised Rule 193-D confers on petitioners standing to bring this action pursuant to RCW 34.04.070.

VII.

The Department's revised Rule 193-D is invalid because it violates the commerce clause, Article I, Section 8, of the United States Constitution (empowering Congress to regulate commerce with foreign nations and among the several states). The rule is also invalid to the extent that it affects foreign commerce covered by the import-export clause contained in Article I, Section 10 of the United States Constitution.

WHEREFORE, petitioners pray for a judgment declaring the Department's revised Rule 193-D invalid as violating the aforesaid clauses of the United States Constitution, and for such other relief as may seem proper.

BOGLE & GATES

JOHN T. PIPER
Attorneys for Petitioners

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

No. 51818

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND THE WASHINGTON PUBLIC PORTS ASSOCIATION,

Petitioners,

vs.

THE DEPARTMENT OF REVENUE,

Respondent.

ORAL DECISION OF THE COURT

(June 26, 1975)

THE COURT: As both of you gentlemen have pointed out in your briefs, the Court is placed in a very awkward position concerning a determination of this matter. First of all, I think that I should comment that Judge Henry in his case, as has been pointed out by Mr. Hicks, was able to draw a distinction, and therefore he as well as the appellate courts of which Mr. Hicks mentions were able to dodge the bullet of ruling specifically on the basic cases here in question. Contrary thereto this Court is faced head on with Puget Sound and Carter and Weekes cases.

It would seem to the Court in light of the cases which have been argued and so thoroughly briefed that there certainly is a swing away from the Puget

Sound and Carter and Weekes cases. We are here involved primarily with the Interstate Commerce clause and the import/export clause. It is true, as counsel for the petitioners advocates, that the cases cited which would infer meaning contrary to the basic cases are not stevedoring cases, and it is true, further, as he has pointed out, that the stevedoring cases involve transportation, and the primary case of Western Livestock did not so involve but involved a type of sales operation. Western Livestock is perhaps the first indication of a break from the Puget Sound and Carter and Weekes cases. It is likewise true, as counsel for petitioners sets forth, that we do have a yearly chronology of the opinions of the court, and from Puget Sound and Carter and Weekes up and through Spector we find in those opinions of the intermediate cases the theory which would seem to be adverse to the basic cases.

It is difficult for this Court to compare these cases and come up with any true answer, and to analyze them would indicate the swing of which the State proposes. The argument concerning goods and activities, goods as distinguished from activities, that activities under the specific Constitutional provisions seem to be losing their protection as compared to goods themselves is certainly obvious. The one difficulty the Court sees is in the Puget Sound and Carter and Weekes cases, that is, they're specifically stating that stevedoring is a part of interstate commerce as distinguished from intrastate or local

activity, as the State makes clear, and I assume that this must be upon the basis that the burden by state imposition of tax in its orderly continuity of interstate commerce would be such that stevedoring must be a part thereof.

Now, it goes without saying that the theory of the cases, with the fact that the stevedoring in this case is merely loading and unloading by local employees, the complete activity being local in nature, is difficult to analyze in relation to Puget Sound and Carter and Weekes. The second argument that has emerged from the succession of cases, of course, is the argument over regulation, and it is true that there have been distinctions made in that regard as to whether or not there is a sufficient regulation to negate the tax, or if we create a situation where the necessary taxable conditions are met that it would be taxable whether it be intra or interstate. Then, of course, we have the theory through the cases of the right of apportionment, as is true in the New York case and Michigan case.

Now, Mr. Hicks would have the Court say that I must take this as a case of first impression, the case before the Court, and the Court would have to conclude that through the years and based upon the arguments of the State of Washington if I were to take this case as one of first impression it would be relatively easy for this Court to find in light of the cases cited that the State of Washington would have the right to tax by way of B&O, it being a local

activity, it being not a regulation, or if we wish to use the apportionment approach that that likewise perhaps could be applicable in theory. Of course, we don't have that problem at this time under the facts. I only indicate that the new approach, as is pointed out by the State, certainly would seem to be logical and of a more modern tendency.

The Court also notes the attitude of the strong minority in these cases, and perhaps the attitude of the professional experts, as well as the tendency of the various state courts to veer from meeting the issue of Puget Sound and Carter and Weekes head on. As has been pointed out, we reach a very fine line in this determination. The Court has examined the Smith case here in our State, and also, of course, the cases in issue, and this Court might feel if it were a case of first impression that it would have the right and privilege as a trial court to make a proper, reasonable, logical conclusion as a result thereof. It sticks in this Court's mind, however, that there has to be a reason, of which is beyond the ability of this Court to comprehend, that everyone has shied from the stevedoring cases, and many minds obviously more brilliant than mine have not been able to overturn those cases directly in thirty-eight years, and it seems to this Court that there must be a good reason therefor, as per the opinions of the members of our Supreme Court of the United States at that time as they pertained to those facts. The fact of the matter is the Supreme Court since those initial cases has not determined and has not found nor declared that steve-

doring activity such as we have before the Court is local activity, and the Court must conclude then in light of that factor it still is a part of the continuous flow of interstate commerce under the Interstate Commerce clause. It stands out like a sore thumb. And I would be inclined to agree as the years have gone by that the factual suitations that exist now are different than they were then to the extent that the so-called new approach would seem more practical and more reasonable. The duty of the Superior Court of this County in relation to the decision of the Supreme Court of the United States is such that it is difficult for me to become Caesar.

Now, the State argues that based upon the flurry of cases which have occurred that thereby there has been a reversal of those basic cases of Puget Sound and Carter and Weekes by implication, and if I don't have the right to do it by implication then the Supreme Court of the State of Washington has indicated in its attitude that it is sufficient for me to find an invitation to overturn a case of the United States Supreme Court of which they at least have not specifically so stated except by other opinions subsequent in time. Well, I believe it goes without saying that I don't believe the Supreme Court perhaps can dictate to me anymore than they would be in the same position as it relates to a decision of the United States Supreme Court. I can only comment in that regard that if the State Supreme Court wishes in their wisdom, being nine in number, that is, desires to tackle the situation so that it is again confronting

the United States Supreme Court, they certainly may be my guest, but I do not find that just on the basis of the history of the cases, when there in fact has been no overturning of the Puget Sound and Carter and Weekes cases, that I can find I have the right to overrule those cases based upon implication, nor can I find that the Supreme Court's decisions actually in fact indicate an invitation to do so, because the Smith case does not specifically say that it is bad law, it only indicates that as to that particular case, well, they didn't say "apply" but Justice Finley's use of words was not proper as they applied to the Court's feeling as such.

It goes without saying, as all counsel realize, that the issue here is a head-on confrontation with cases of which are still the law of the land. I can find no invitation, I can find no implication of which would necessitate this Court in making a different ruling, or in fact legally being able to do so. And I want it understood that the Court in no way is attempting to dodge a bullet. We know that this is going to be a test case as it progresses through the various Appellate Courts, and I think rightfully so, but I do not believe this Court has the authority to join in an academic yo-yo and come up with a number of pearls of wisdom of which in either event would not be anything but lost in the shuffle as we progress through the various Appellate Courts to the Supreme Court of the United States.

Under those circumstances the Court does hold that the Puget Sound and Carter and Weekes cases

are the law of the land, as exemplified by those decisions; that they have not been reversed by implication, nor has there been an invitation to anyone to reverse those cases. I would agree with counsel for the petitioner that if that is to be done they should do it at such time as the proper determinations could be made accordingly.

This in no way reflects what this Court might do if this were a case of first impression, but the Court is bound by the decision of the United States.

I will sign the appropriate pleadings in accordance therewith.

CERTIFICATE

STATE OF WASHINGTON }
COUNTY OF THURSTON } ss.

I, GENE BARKER, an Official Court Reporter of the State of Washington, do hereby certify that the foregoing transcript of the Oral Decision of the Court, presented in the above-entitled and numbered Cause by the Honorable FRANK E. BAKER, Judge of the Superior Court of the State of Washington, in and for the County of Thurston, on the 26th day of June, 1975, was reported by me on said date and reduced to typewriting under my direction.

I further certify that said transcript of the Oral Decision of the Court, as above transcribed, is a full, true and correct transcript of the machine shorthand notes of the aforementioned matter.

DATED AND SIGNED this ..... day of August, 1975.

.....

Official Court Reporter

APPENDIX G

Assignments of error

The trial court erred in entering its judgment of November 24, 1975 declaring the Department of Revenue Rule 193D invalid and unconstitutional.

Issues pertaining to assignments of error

Is the business activity of loading and unloading at a local pier ships, which ply interstate and foreign commerce, subject to a state's general business and occupation tax?